90-1936 (1)

Supreme Court, U.S.
FILED
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PARKER SOLVENTS COMPANY, INC.,
Petitioner,

vs.

ROYAL INSURANCE COMPANIES
OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Paul K. Holmes, III*
G. Alan Wooten
WARNER & SMITH
P.O. Box 1626
Fort Smith, AR 72902
(501) 782-6041

*COUNSEL FOR PETITIONER

QUESTION PRESENTED

Whether the court of appeals erred by not granting Petitioner's Motion to Vacate and/or Motion for leave to file a Petition for Rehearing Out of Time in light of this Court's recent decision in Salve Regina College v. Russell 499 U.S. _____, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Parker Solvents Company, Inc. ("Parker") respectfully prays that a writ of certiorari issue to review the judgment and opinion entered on March 22, 1991, and order entered on May 17, 1991 of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The order denying Petitioner's Motion to Vacate and/or Motion for leave to file a

Petition for Rehearing Out of Time appears in Appendix A. The opinion and judgement of the court of appeals appears in Appendix B. The opinion and judgment of the district court appears in Appendix C.

JURISDICTION OF THIS COURT

The judgment of the court of appeals was entered March 22, 1991. The order denying Petitioner's Motion to Vacate and/or Motion for leave to file a Petition for Rehearing Out of Time was entered on May 17, 1991. The statutory provision confirming jurisdiction on this Court is 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Petitioner, Parker Solvents Company, Inc., ("Parker") filed a declaratory judgment action against the Respondent, Royal Insurance Companies of America, ("Royal") in the United States District Court for the Western District of Arkansas ("district court") concerning the interpretation of two Comprehensive General Liability ("CGL") policies issued by Royal to Parker. Parker contended that Royal was responsible for all sums Parker was obligated to pay in connection with the clean up of a waste disposal site operated near Fort Smith, Arkansas. Parker incurred the clean up costs pursuant to a consent decree under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §964 et seq. In this diversity jurisdiction case requiring application of state law, the district court entered a summary judgment in

favor of Royal finding that its decision was controlled by Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Co., Inc. 842 F.2d 977 (8th Cir. 1988) (en banc) ("NEPACCO") (interpreting Missouri law). The district court concluded that Arkansas law was identical to Missouri law on this issue. Parker appealed to the United States Court of Appeals for the Eighth Circuit ("court of appeals") from the judgment entered by the district court.

In an unpublished opinion decided on March 22, 1991, the court of appeals affirmed the judgment of the district court. Citing Harbor Ins. Co. v. Essman 918 F.2d 734 (8th Cir. 1990), the court of appeals found it must give great weight to the decisions of district judges on questions of state law. The court of appeals also cited Grisham v. Commercial Union Ins. Co. 927 F.2d 1039 (8th Cir. 1991) (interpreting Arkansas law) as authority for affirming the judgment of the district court.

Grisham, supra, was decided on March 8, 1991 which was 14 days before the decision in this case. The two cases involve a similar set of facts. The appellants in Grisham, supra, timely filed a petition for rehearing.

On March 20, 1991, this Court decided Salve Regina College v. Russell 499 U.S. _____, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991) which represented a significant change in the standard for appellate review of state law in diversity cases. On April 11, 1991, the court of appeals vacated its opinion and judgment in Grisham, supra, and granted the appellants petition for rehearing in light of this Court's decision in Salve Regina College, supra. Grisham, supra, is still pending before the court of appeals.

On April 16, 1991, Parker learned of the decision of the court of appeals to vacate its opinion and judgment in Grisham, supra. On April 18, 1991, Parker filed a Motion to Vacate and/or Motion for leave to file a

Petition for Rehearing Out of Time with the Court of Appeals. On May 17, 1991, the court of appeals denied the Parker's motion. Parker files this Petition for Writ of Certiorari for review of the order, and judgment and opinion of the court of appeals.

ARGUMENT

The district court dismissed Parker's claim against Royal for insurance coverage for clean up costs incurred by Parker pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"). 42 U.S.C. §964 et seq. The legal issue before the district court was whether the term "damages" in a standard form CGL policy includes clean up costs. The district court held that it was bound by Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Co., Inc., 842 F.2d 977 (8th Cir. 1988) (en banc) ("NEPACCO") which involved the interpretation of Missouri insurance law. Parker argued in the district court and the court of appeals that Arkansas law was different from Missouri law. The court of appeals affirmed the decision of the district court stating it was required to give great weight to the decision of the district

judge on the question of state law. The court of appeals relied upon Harbor Ins. Co. v. Essman 918 F.2d 734 (8th Cir. 1990), and Grisham v. Commercial Union Ins. Co. 927 F.2d 1039 (8th Cir. 1991). The court of appeals rendered its decision on March 22, 1991.

On March 20, 1991 this Court changed the standard for appellate review on questions of state law in Salve Regina College v. Russell 499 U.S. _____, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991). This Court held:

> "We conclude that a court of appeals should review de novo a district court's determination of state law. As a general matter, of course, the courts of appeals are vested with plenary appellate authority over final decisions of district courts. See 28 USC §1291 [28 USCS §1291]. The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations."

Because of the newness of the case, the court of appeals did not implement this new standard in Grisham, supra, or in this case. Grisham, supra, involved the same legal issue as this

case, and was decided on March 8, 1991.

The holding in Salve Regina College v. Russell, supra, specifically rejected two previous decisions of the Eighth Circuit, namely Norton v. St. Paul Fire & Marine Ins. Co. 902 F.2d 1355 (Cir. 8th 1990) and Foster v. National Union Fire Ins. Co. 902 F.2d 1316 (Cir. 8th 1990). Those cases previously held that an appellate court must give due deference to the decision of the district judge on state law. The holding in Norton, supra, and Foster, supra, was followed and cited by the Eighth Circuit in Grisham, supra. Harbor Ins. Co., supra, cited in this case, follows the same holding on the issue of state law. Therefore, it is clear that the court of appeals did not follow the correct standard for appellate review of state law in this case.

The appellants in Grisham, supra, filed a petition for rehearing on March 17, 1991 which was three (3) days before the decision in

Salve Regina College, supra. On April 11, 1991, the court of appeals granted the petition for rehearing and vacated its opinion and judgment. The attorneys were asked to brief the issue of Salve Regina College, supra. The case is still pending before the court of appeals.

On April 16, 1991, Parker learned of the decision of the court of appeals to vacate its opinion and judgment in Grisham, supra. Two (2) days later Parker filed a Motion to Vacate and/or Motion for leave to file a Petition for Rehearing Out of Time. Parker's time for filing a Petition for Rehearing had already expired. Parker based this motion on the action taken by the court of appeals to vacate its opinion and judgment in Grisham, supra. Since Parker had ninety (90) days to file a Petition for Writ of Certiorari with the United States Supreme Court, it believed that the filing of its motion was the proper avenue to pursue review of its case under the new

standard. The court of appeals denied Parker's motion on May 17, 1991.

Parker contends that it is entitled to a de novo review of state law based upon Salve Regina College v. Russell, supra. The court of appeals rendered its decision two (2) days after this Court rendered the decision in Salve Regina College v. Russell, supra; however, the court of appeals still did not see fit to grant Parker's motion even though it vacated its opinion and judgment in Grisham, supra. Since the Grisham case was dispositive of this case, Parker contends that it should likewise be entitled to de novo review of the state law.

Parker prays that this Court will grant its Petition for Writ of Certiorari, and that this Court will order the court of appeals to vacate its opinion and judgment. Parker is in the precarious position of having its rights completely foreclosed while the case which formed the basis for the Eighth Circuit's

decision in this case (Grisham, supra,) could be reversed with a favorable result to the appellants. Parker prays that this Court will grant its Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Paul K. Holmes, III*
G. Alan Wooten
WARNER & SMITH
P.O. Box 1626
Fort Smith, AR 72902
(501) 782-6041

*COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I, Paul K. Holmes, III, counsel of record for the Petitioner, do hereby certify that I have, on this 18th day of June, 1991, served the Petition for Writ of Certiorari on the counsel for the Respondent by mailing a copy to, M. Stephen Bingham, BARBER, McCASKILL, AMSLER, JONES & HALE, P.A., 1200 Union National Plaza, 124 West Capitol, Little Rock, Arkansas 72201.

Paul K. Holmes, III

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-2224WA

Parker Solvents Company, Inc.,	*	
	*	
Appellants,	*	
	*	
vs.	*	Appeal from the
	*	United District
Royal Insurance	*	Court for the
Companies of America	*	Western District of
(formerly Royal Globe	*	Arkansas
Insurance Co.),	*	

Appellee.

Appellant's motion to vacate and/or motion for leave to file a petition for rehearing out of time has been considered by the court and is denied in its entirety.

May 17, 1991

Order entered at the Direction of the Court:

/S/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 90-2224WA

Parker Solvents Company, Inc.,	*	
	*	
Appellants,	*	
	*	
vs.	*	Appeal from the
	*	United District
Royal Insurance	*	Court for the
Companies of America	*	Western District of
(formerly Royal Globe	*	Arkansas
Insurance Co.),	*	
	*	[UNPUBLISHED]
Appellee.	*	

Submitted: March 12, 1991

Filed: March 22, 1991

Before FAGG, Circuit Judge, SNEED,* Senior Circuit Judge, and LOKEN, Circuit Judge.

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* The HONORABLE JOSEPH T. SNEED, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM.

Parker Solvents Company, Inc. ("Parker") appeals from a district court[1] order granting summary judgment dismissing Parker's declaratory judgment action against Royal Insurance Companies of America ("Royal"). We affirm.

Royal issued two comprehensive general liability ("CGL") insurance policies to Parker covering the policy period October 1, 1975 to October 1, 1977. Parker's complaint sought a declaration that Royal is obligated to indemnify Parker under those policies for all sums paid by Parker pursuant to a consent decree in an action by the United States Environmental Protection Agency under CERCLA, 42 U.S.C. §§ 964 et seq., to compel Parker and other to clean up a licensed waste

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[1]The Honorable Morris S. Arnold, United States District Judge for the Western District of Arkansas.

disposal site to which Parker had delivered hazardous wastes during the policy period, prior to the enactment of CERCLA. The district court held that Parker's suit is governed by this court's en banc decision in Continental Ins. Co. v. Northwestern Pharmaceutical & Chem. Co., 842 F.2d 977 (8th Cir.), cert. denied, 488 U.S. 821 (1988) (NEPACCO), rejecting Parker's assertions that the facts of this case and applicable Arkansas law make NEPACCO distinguishable. Therefore, Parker's suit was dismissed because Royal's CGL policies provide no coverage for CERCLA-imposed clean-up obligations.

On appeal, Parker presses its arguments (1) that the construction of the phrase "as damages" in a standard form CGL policy is different under Arkansas laws than under the Missouri law at issue in NEPACCO, and (2) that this case is factually distinguishable because here Parker, the insured, has attempted to mitigate damages by participating in the

clean-up effort. Having reviewed the record and considered these arguments, and mindful that this court gives great weight to decisions of district judges on questions of state law, Harbor Ins. Co. v. Essman, 918 F.2d 734, 738 (8th Cir. 1990), we summarily affirm the district court's ruling that, on the facts of this case, NEPACCO is controlling under Arkansas law. See 8th Cir. R. 47B; Grisham v. Commercial Union Ins. Co., No. 89-1481 (8th Cir. Mar. 8, 1991).

Finally, Parker asks us to reconsider NEPACCO, noting that the Second Circuit recently reached a contrary result under New York law in Avondale Indus., Inc. v. Traveler's Indemnity Co., 887 F.2d 1200 (1989), cert. denied, 110 Sup. Ct. 2588 (1990). Even if we were inclined to reconsider NEPACCO, which we are not, a panel of this court may not overrule a prior en banc decision. United States v. Andrade, 788 F.2d 521, 524 n.3 (8th Cir.) cert. denied sub.

nom., Riley v. United States, 479 U.S. 963 (1986).

Accordingly, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

PARKER SOLVENTS COMPANY, INC. PLAINTIFF

v. Civil No. 89-2293

ROYAL INSURANCE COMPANIES OF AMERICA (FORMERLY ROYAL GLOBE INSURANCE CO.) DEFENDANT

MEMORANDUM OPINION

I.

This case comes before the court on a stipulated record. During 1976 and 1977, defendant provided a comprehensive general liability insurance policy to plaintiff. Pursuant to this policy, defendant agreed to pay "all sums which the insured shall become legally obligated to pay as damages because of [bodily injury or property damage] ..." (CX A).[1] At that time, plaintiff sold a chemical

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[1]CX = Complaint Exhibit
PB = Plaintiff's Brief
DB = Defendant's Brief
DRB = Defendant's Reply Brief

called Washoff No. 168, and had its used and dirty Washoff No. 168 disposed of at an Industrial Waste Control, Inc. (IWC) waste disposal site.

In 1988, the U.S. Environmental Protection Agency (EPA) found that Washoff No. 168 might constitute hazardous waste, and notified plaintiff that it might be liable for cleanup costs under the Comprehensive Environmental Response compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9604 et. seq. (1982). In May, 1989, the United States sued plaintiff under CERCLA. On July 21, 1989, the CERCLA action was settled by a consent decree which required that plaintiff contribute to the past and future cleanup costs of the IWC site. Plaintiff then filed a claim for reimbursement of cleanup costs under the insurance policy, defendant denied coverage, and plaintiff filed the instant action for breach of the policy. The parties filed cross-motions for summary

judgment, and later agreed to have the case decided on a stipulated record. For the reasons stated below, the court will enter judgment for the defendant.

II.

Plaintiff correctly notes that "[t]he legal issue before the court is whether the term 'damages' in a standard form CGL {comprehensive general liability] policy includes cleanup costs ..." (PB 4). The Eighth Circuit has held that the term "damages" does not cover cleanup costs. See Continental Insurance Company v. Northeastern Pharmaceutical & Chemical Co., 842 F.2d 977 (8th Cir.) (en banc), cert. denied, 109 S. Ct. 66 (1988) ("NEPACCO") (interpreting Missouri law). Judge Waters of this district has held that NEPACCO should be applied to cases arising under Arkansas law. See Maryland Casualty Company v. Ormond, slip op., Civ. No.

87-3038 (W.D. Ark. Jan. 6, 1989). Courts in other jurisdictions are divided. See Cincinnati Ins. Co. v. Milliken & Co., 857 F.2d 979 (4th Cir. 1988) (holding that cleanup costs not "damages"); but see contra Avondale Industries, Inc. v. Travelers Indemnity Company, 887 F.2d 1200 (2d Cir. 1989); Port of Portland v. Water Quality Ins. Syndicate, 796 F.2d 1188 (9th Cir. 1986); compare Maryland Casualty Company, slip op. at 8-10 n.1 (citing scores of district court and state cases on both sides of the question).

Admittedly, the Eighth Circuit's interpretation of Missouri law is not binding upon this court in cases arising under Arkansas law. On the other hand, such decisions are "clearly indicative of the manner in which the Eighth Circuit would decide the instant case [under Arkansas law] ...", Maryland Casualty Company, slip op. at 12. Thus, NEPACCO should be followed unless plaintiff can show (1) that NEPACCO would have

been decided differently under Arkansas law, or (2) that NEPACCO is distinguishable from this case on its facts.[2] Each of these questions will be addressed below.

III.

Plaintiff argues that relevant Arkansas law differs from Missouri law, for three reasons.

First, plaintiff argues that under Arkansas law, "the court is to construe the language in an insurance contract in its plain, ordinary, and popular meaning rather than its technical meaning." (PB 5).

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[2] Plaintiff also suggests that as a matter of policy, NEPACCO should not be followed because it "is not widely followed in other circuits ... [and] ignores the public policy argument that insurers should likewise bear some of the enormous costs to clean up the environments." (PB 5). If the court's decision is appealed in this case, the Eighth Circuit will review it. Thus, it would be completely futile for this court to reject the NEPACCO court's reasoning.

Similarly, Missouri courts have held that "[t]he rules of construction applicable to insurance contracts require that the language used be given its plain meaning ... and language used will be viewed in light of the meaning that would ordinarily be understood by the law [person] who bought and paid for the policy." Robin v. Blue Cross Hospital Service, 637 S.W.2d 695, 698 (Mo. 1982) (citations omitted), quoted in NEPACCO, 842 F.2d at 985. The Eighth circuit quoted this "plain meaning" language, but went on to hold that "the plain meaning of the term 'damages' as used in the insurance context refers to legal damages and does not include equitable monetary relief." NEPACCO, 842 F.2d at 985. The court therefore finds that the "plain meaning" rule does not bar application of NEPACCO.

Second, plaintiff notes that ambiguities in an insurance contract "should be construed to provide coverage unless the construction

would be patently unreasonable." (PB 6). Similarly Missouri courts have held that "[i]f the language is ambiguous it will be construed against the insurer." Robert, 637 S.W.2d at 698, quoted in NEPACCO, 842 F.2d at 985. The NEPACCO court cited this rule, but held that the parties' standard liability insurance policy (the type at issue both in this case and in NEPACCO) was simply not ambiguous.

Third, plaintiff notes that under Arkansas law, "costs of restoration are considered damages ... [t]his measure of damages allows a plaintiff to recover costs of restoring real property to its prior condition." (PB 6). Similarly, Missouri law provides that the "measure of damages to real property is [the] lesser of either [the] difference in value before and after injury or [the] cost of restoring property to its original condition." NEPACCO, 842 F.2d at 987, citing Jack L. Baker Cos. v. Pasley Manufacturing & Distributing Co., 413 S.W.2d

268, 273-74 (Mo. 1967). The NEPACCO court noted that restoration expenses differed from cleanup costs, because "some natural resources are of exceptional value and their destruction would greatly exceed the cost of cleaning up any hazardous waste contamination." Id. at 986-87.

In sum, the court finds that Arkansas law and Missouri law are identical as to the issues in this case, and therefore agrees with Judge Waters's statement that "[b]ecause the state laws of both states are, for the most part, identical on this issue, the court feels constrained to hold that NEPACCO is dispositive of this case." Maryland Casualty Company, slip op. at 12.

IV.

Plaintiff next argues that NEPACCO is distinguishable on its facts because:

> In NEPACCO, the primary defendant (insured) was a defunct corporation who failed to appear or answer the declaratory judgment action filed by Continental Insurance company. The State

> of Missouri intervened and contended that Continental should provide coverage. In the underlying environmental cases, the State of Missouri cleaned up the sites because the defendant abdicated its responsibility to clean up the sites. The State of Missouri, not the primary defendant (insured), sought a declaration of Continental's liability in order to recover its cleanup costs. In this case, Parker made efforts to mitigate its liability by joining the IWC Steering Committee. Parker participated in the IWC Steering Committee discussions, and acknowledged its responsibility to assist in the cleanup of the IWC site. This resulted in the IWC site being cleaned up at considerably less expense than a cleanup by the government. Parker immediately notified Royal, and reasonably believed that the CGL policies covered the liability.

(PB 7). The court fails to see how the identity of the parties or the morality of plaintiff's conduct is at all relevant to the legal question of what constitutes "damages" under the insurance policy. The NEPACCO court adopted its admittedly narrow definition of damages for four reasons: (1) the general rule that claims for equitable relief are not damages claims under liability insurance contracts, NEPACCO, 842 F.2d at 985-86; (2)

the contract's provision that the insurer would be liable only for "all sums which the insured shall become legally obligated to pay as damages" instead of for "all sums which the insured shall become legally obligated to pay," id. at 986 (emphasis in original); (3) CERCLA's differentiation between cleanup costs and damages, id. at 986-87; and (4) the possibility that cleanup costs may differ dramatically from damages. Id. at 986-87. None of these reasons is affected in the least by the identity or moral culpability of the parties.

The court, therefore, finds that NEPACCO is indistinguishable on its facts, and will accordingly enter judgment for the defendant in this case.

/S/ Morris S. Arnold

JULY 02, 1990 HON. MORRIS S. ARNOLD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

PARKER SOLVENTS COMPANY, INC. PLAINTIFF

v. Civil No. 89-2293

ROYAL INSURANCE COMPANIES OF AMERICA (FORMERLY ROYAL GLOBE INSURANCE CO.) DEFENDANT

O R D E R

NOW on this 2nd day of July, 1990, comes on for consideration the above-styled cause, which the parties have agreed to have decided on a stipulated record.

For the reasons stated in the accompanying Memorandum Opinion, it is ORDERED that judgment be, and it is hereby, entered for the defendant.

/S/ Morris S. Arnold
HON. MORRIS S. ARNOLD
UNITED STATES DISTRICT JUDGE